Wellman Thermal Systems Corporation and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), AFL-CIO, and Local 1793. Cases 25-CA-14731 and 25-CA-14761

15 March 1984

ORDER REMANDING PROCEEDING TO THE ADMINISTRATIVE LAW JUDGE

By Chairman Dotson and Members ZIMMERMAN AND HUNTER

On 28 December 1982, Administrative Law Judge Leonard M. Wagman issued an Order approving the settlement¹ in these cases. Thereafter, on 11 January 1983, counsel for the General Counsel filed a motion for special permission to appeal with the National Labor Relations Board seeking to overturn the settlement.² On 1 March 1983, the Board issued an Order denying the motion.

On 28 July 1983 Judge Wagman issued the attached Supplemental Order resolving two³ disputes arising out of the implementation of the settlement.⁴ On 2 September 1983, the Charging Party filed exceptions to the Supplemental Order and a brief in support.⁵ The Charging Party contends, inter alia, that Judge Wagman should have deferred to the contractual grievance process or, alternatively, should have held a hearing on the two disputed matters.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board, having duly considered the matter, has decided to vacate the Supplemental Order and remand the proceeding to Judge Wagman for the to that process.

We find merit, however, to the Charging Party's contention that the judge should have held a hearing prior to issuing his Supplemental Order resolving the disputed matters. It is well settled that due process mandates an opportunity to be heard before a judicial tribunal may make findings of fact. The judge made several findings of fact⁸ in the Supplemental Order without holding any hearing.

purpose of holding a hearing and preparing deci-

We find the Charging Party's contention that the

judge should have deferred to the contractual

grievance process is wholly without merit. When parties agree to a voluntary settlement of a Board

complaint, and the settlement is approved by an administrative law judge with review denied by the

Board, we will hold the parties to the exact terms of the settlement agreement. The agreement herein

expressly provides that the judge shall retain juris-

diction over the cases to review compliance. The agreement does not provide that the parties shall

settle disputes arising thereunder by means of the

grievance process. Lacking any express or clearly

implied intent to refer disputes to the grievance

machinery, we decline to require the judge to defer

sion on the two disputed matters.

We hold that the parties are entitled to that hearing, pursuant to the Board's regulations, on the two disputed matters prior to the issuance of any Supplemental Order herein.

It is hereby ordered that the Supplemental Order

be vacated and that this proceeding be remanded to Administrative Law Judge Wagman for the purpose of arranging a hearing.

It is further ordered that the issues at the hearing be limited to resolving the two disputed matters herein.

IT IS FURTHER ORDERED that, upon conclusion of such hearing, Administrative Law Judge Wagman shall reconsider his initial rulings, findings, and conclusions and shall thereupon prepare and serve on the parties a Supplemental Order containing rulings, findings, and conclusions as to the two disputed matters herein; and that, following the service of such Supplemental Order upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations, shall be applicable.

SUPPLEMENTAL ORDER

LEONARD M. WAGMAN, Administrative Law Judge. The Respondent (Wellman Thermal Systems Corporation) and the Union (International Union, United Automobile, Aerospace and Agricultural Implement Workers

¹ Also see Wellman Thermal Systems, 269 NLRB 162, issued today on an unrelated aspect of this case. The consolidated complaint herein issued on 30 September 1982 alleging violations of Sec. 8(a)(1), (3), and (5). On 15 November 1982 Judge Wagman opened and recessed the hearing on these cases for the purpose of encouraging settlement discussions. On 17 November 1982, pursuant to the Board's Statement of Procedure Sec. 101.9(d)(1), he tentatively approved the settlement agreement negotiated by the Charging Party and the Respondent. The General Counsel filed a motion to reject the settlement, which was denied by Judge Wagman's 28 December 1982 Order.

² Counsel for the General Counsel contended that the settlement lacked adequate remedial provisions under Clear Haven Nursing Home, 236 NLRB 853 (1978).

³ The first dispute concerns employee Janet Stover's right to recall under the settlement. The second dispute deals with the time of payment of certain supplemental benefits provided by the settlement.

⁴ Under the terms of the settlement, Judge Wagman retained jurisdiction over the cases "to review compliance by the parties." It appears that the Respondent, by letter dated 6 July 1983, requested that the judge assert jurisdiction over the two disputed matters and render a decision. It is unclear from the record how the Charging Party or the General Counsel responded to this request. The judge then issued his 28 July 1983 Order without benefit of holding a hearing.

⁵ The Respondent and the General Counsel did not file any answering brief or cross-exceptions.

⁶ For example, he found that employee Stover had not complied with Sec. 7(d) of the collective-bargaining agreement in seeking recall.

of America, and Local 1793) have asked me to resolve two issues arising out of the implementation of the informal Settlement Agreement¹ which I approved in these cases on November 17, 1982. Under paragraph 6 of that agreement I have retained jurisidiction "to review compliance by the parties." As the issues presented involve such compliance, I have taken them under consideration.

The first issue presented pertains to the recall of strikers designated as "Group One" under the Settlement Agreement,² and the claim of a nonstriking employee, who was on layoff status when the strike began and was designated as a "Group Two" employee in the agreement,³ that she is entitled to be recalled ahead of a Group One employee because of her greater seniority (herein Group I and Group II).

The Group II employee, Janet Stover, has filed a grievance contending that she was wrongfully deprived of reinstatement on the ground that she had greater seniority than a Group I employee recalled in April 1983 to a position in a classification designated as "S-16." Under the Settlement Agreement which I approved, the Respondent agreed to recall Group I employees to work in accordance with a schedule set out in the memorandum of agreement which the Respondent and Local 1793 executed on September 15, 1982, between the parties dated September 15, 1982, referred to as the strike Settlement Agreement. It was these same employees who, according to the consolidated complaint in these cases, had suffered unlawful discrimination at the Respondent's hands when it refused to reinstate them at the conclusion of the alleged unfair labor practice strike. The agreements show an intent to treat the Group II employees separately from the Group I employees. Paragraph I of the Group II portion of the Settlement Agreement requires that the Respondent make specific payments in lieu of wages to the Group II employees. The Settlement Agreement also provides for Group II employees:

- 3. On October 1, 1983, all Group II employees who have not been recalled to their job classification or job family shall be allowed to exercise their seniority. For the purposes of exercising their seniority on October 1, 1983, all Group II employees shall accumulate seniority until October 1, 1983, and thereafter the provision of the collective-bargaining agreement will apply.
- 4. It is the intent of Paragraph 3 to make Group II employees more senior than any other employees hired as strike replacements and to permit Group II

employees to displace strike replacements working in their job classification or job family.

From the foregoing, I find that the parties agreed to provide for the reinstatement of the Group II employees, but not at the expense of the Group I employees.

The following language of paragraph 13 of the parties' memorandum of agreement requires that I look into the current collective-bargaining agreement regarding Group II employees:

13. Hourly employees who were on lay-off at the time of the strike will have recall rights as agreed upon in the terms of the new contract.

Article XIII, section 7(a) and (b) of the collective-bargaining agreement, provided:

Section 7-Recall

- (a) Recall(s) from layoff shall be in inverse order of layoff and in relative order of seniority.
- (d) An employee who was on layoff and wants to be considered for an S-16 and below job must sign up at Employment Relations and be recalled to the opening, seniority permitting, subject to the provision of the strike settlement agreement.

There is no showing that Janet Stover complied with Section 7(d).

The parties have confronted me with an array of arguments. The Union contends alternatively that Stover's grievance should be the subject of arbitration under the collective-bargaining agreement but, if I decide to consider the issues myself, the Union urges that I provide a hearing by which I would be educated as to the impact of instant dispute on an entire collective-bargaining agreement, and finally, the Union contends that, under the Settlement Agreement and the memorandum of agreement, Stover was entitled to the disputed job. The Company contends that the Group I employee who occupied the S-16 job, at the outset of the strike, was entitled to reinstatement under the Settlement Agreement and the memorandum of agreement which settled the strike. I agree with the Respondent.

From my reading of the memorandum of agreement and the Settlement Agreement, I find that the parties' primary objective was to restore the Group I employees to the employment status which they enjoyed on the eve of the strike. The memorandum of agreement makes provision for the reinstatement of that category of employee with specificity and in accordance with a schedule. The Settlement Agreement looking to the complaint in these cases attempted to remedy the allegation that the Respondent had unlawfully refused to reinstate that same group of employees. Given that objective and the special treatment accorded the alleged discriminatees, I find that the parties intended to restore them to the positions they held on the eve of the strike. I also find that the parties did not intend to grant Group II employees any opportunity to exercise their seniority to the detriment of the Group I employees. Accordingly, I conclude that under

¹ On September 15, 1982, the Respondent and Local 1793 entered into a strike settlement agreement entitled "Memorandum of Agreement." Under par. 5 of the Settlement Agreement in the instant case, the Respondent and the Union agreed that "[t]he strike settlement agreement remains in full force unless specifically modified by the terms of [the Settlement Agreement]."

² Group One: Those working at the time the strike began (July 23, 1982) but not at the time of the Settlement Agreement (September 15, 1982) but excluding those employees on suspension without pay.

⁵ Group Two: Those employees who were on layoff at the time the strike began (July 23, 1982) and were not working at the time the strike ended (September 15, 1982) but excluding those employees on suspension without pay.

the terms of the Settlement Agreement and the memorandum of agreement, Group II employee Stover was not entitled to bump a Group I employee from the S-16 classification job.

The second question presented is whether a lump sum payment of income extension aid to a Group II employee entitles that employee to receive immediately the supplemental benefits required under the Settlement Agreement. The Settlement Agreement provides that after their unemployment and income extension aid benefits (IEA) "are exhausted," the Group II employees are entitled to receive from the Respondent argues that, under the Settlement Agreement, acceptance of a lump sum IEA payment by a Group II employee does not exhaust his or her IEA benefits and thus does not accelerate the payment of the weekly supplemental benefits. Instead, according to the Respondent, the IEA should be prorated over the number of weeks the employee would have been entitled to such benefits under the collective-bargaining agreement. The Union rejects the Respondent's position, and urges that the lump sum IEA payment constitutes exhaustion of those benefits and entitles the Group II employee to immediate receipt of the weekly payments set out in the Settlement Agreement. I agree with the Respondent.

Neither the memorandum of agreement nor the Settlement Agreement expressly provides guidance in this dispute. For neither agreement defines the term "exhausted" in reference to the IEA benefits to be accorded Group II employees under the Settlement Agreement.

However, the IEA benefits to which the agreements refer are discussed in article XXII, of the current collective-bargaining agreement, which was also in effect at the time the parties executed and I approved the Settlement Agreement. By examining this provision to detect its purpose, the treatment to be accorded a lump sum payment can be inferred. The following language in sections 1 and 2 of article XXII are instructive on the purpose of IEA:

Section 1-General

An employee with two or more years of continuous service will, in accordance with the provisions hereinafter set forth, have available an income extension arrangement for use in the event of layoff for lack of work or plant closing.

Section 2-Computation of Income Extension Aid

(1) The Income Extension Aid shall be computed on the basis of one week's pay for each of the employee's full years of continuous service plus 1/4 of a week's pay for each additional three (3) months of continuous service at the time of layoff. A "week's pay" for an hourly employee shall be calculated by multiplying the higher of, (a) their straight time hourly rate (including any night shift bonus) which they were paid during the last week worked by them or, (b) their average straight time hourly rate (including any night shift bonus) which they were paid during the last week worked by them during the calendar year preceeding [sic] the year in which their current layoff began, times the number of hours in the employee's normal work week, up to forty (40) hours.

- (2) If the amount of income extension aid available to any employee as computed in sebsection [sic] (1) has been reduced by payments under any of the options of the plan, then, providing they have returned to work from layoff and after fifty-two (52) weeks from the date of layoff, the total amount available as described in subsection (1) shall be automatically restored. In any event the amount available upon return to work and before such restoration of benefits shall be no less than the amount available upon return to work increased at the rate of one week per calendar quarter of continuous service accrued following their return from layoff. This subsection shall not apply where payments have been made under the subsection 3(1)(c) or under plant closing Section 4 where the employee is rehired within six (6) months of termination, except. that when an employee makes repayment of benefits paid under such subsection 3(1)(c) or Section 4, this subsection 2 shall apply when he returns to work with respect to a subsequent layoff.
- (3) Minimum Benefit: The amount of the income extension aid benefit as computed under Section 2 (1) shall be subject to a minimum benefit equal to four (4) week's pay.

I find from the quoted language that the contractual intent was to provide employees with benefits in lieu of weekly pay. The computation of IEA benefits according to the quoted language is to be on a weekly basis. Therefore, any lump sum of IEA payment which amounts to two or more weeks' benefits should be prorated over the number of weeks anticipated by that payment. Accordingly, I find that a lump sum payment of IEA benefits does not trigger a Group II employees' entitlement to the supplement benefits provided in the Settlement Agreement. I find that the IEA payments become exhausted with the expiration of the period covered by the lump sum payment.